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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 331

ROY JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 112–118) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1957 (R. 119), and a petition for rehearing was denied on July 3, 1957 (R. 125). The petition for a writ of certiorari was filed on July 31, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the search and seizure was reasonable.

STATEMENT

A four-count indictment filed in the District Court for the Northern District of Georgia charged petitioner and two other defendants with violating the laws relating to liquor (R. 1–2). The petitioner was tried by the court without a jury (R. 95, 101) and found guilty as charged (R. 102). He was sentenced to three years imprisonment, plus a $100 fine on the first count, and fined $500 on the second count (R. 103–104). On appeal, the conviction was affirmed (R. 112–118).

1. On April 30, 1956, having received information that petitioner was operating an illegal distillery in his farm house near Dawsonville, Georgia (R. 32, 45, 48), federal agents went to the farm to investigate (R. 45, 75). In a hollow behind petitioner's house, agents found spent mash—which has a characteristic appearance—running out of a rubber hose into a stream (R. 39, 75, 76). There is no known way to produce spent mash except by distilling the alcohol out of mash (R. 76). The officers traced the partially buried hose to within 57–75 yards of petitioner's house—as far as they dared go without risk of being seen (R. 39, 48, 75, 79). The hose led toward petitioner's residence (R. 75).

Four federal agents and one state officer returned to the vicinity of petitioner's house the following day. The hose was still in place and delivering mash into the stream (R. 40–41). The agents kept watch until the early morning hours of May 2, 1956 (R. 42). They could hear voices and the sound of a blower burner operating in the house, and smelled mash cooking

(R. 42, 55, 64–65, 76–77). Heat is used during the course of distilling alcohol out of mash (R. 80), and blower burners are quite commonly used as a source of heat in the operation of illegal distilleries in Dawson County, Georgia. Blower burners are not commonly used for any other purpose in that area (R. 44).

On May 2, 1956, agent Langford obtained a daytime search warrant for petitioner's house (R. 5–7). The group of investigators then returned to the vicinity of the house, arriving there in the late afternoon about a half hour before dark (R. 60, 66, 77). It began to rain heavily and the agents decided to make further observations rather than execute the warrant at that time (R. 82–83). While concealed in a wooded area across the road from the house (R. 59, 77), they heard someone at petitioner's residence say, "Do you want to bring the truck?". Then someone left the yard and walked up the road toward the home of petitioner's father and brother, located about ¼ mile away (R. 18, 70, 77). Later, a truck drove into petitioner's yard and around to the back of the house, out of the agents' sight (R. 55, 77). At about 9:15 p. m., after the sound of heavy objects being moved had emanated from the rear, the truck was driven around the end of the house. It became stuck in petitioner's driveway as the driver attempted to pull onto the public road in front of the house (R. 56, 70–71). At this point the agents arrested the two men in the truck, and found that it was loaded with over 400 gallons of untaxed liquor (R. 42–43, 56–57, 78).

A car driven by petitioner's wife drove into petitioner's yard through a second driveway just as the

agents moved across the road (R. 25, 56, 65, 78). When the agents moved onto the porch of the house, they found petitioner's 13 year-old son, who had obtained a shotgun and was holding it at port arms (R. 65). The boy ran through the house from front to back (R. 65). By this time the agents had the house surrounded (R. 57, 72, 78). The boy returned to the front of the house, remaining in the hall (R. 30, 65). Meanwhile, Mrs. Jones had taken up a position blocking the door (R. 57) and refused to tell her son to put down the shotgun (R. 65). After a moment or two of conversation, state agent Hollingsworth succeeded in edging close enough to the boy to jump inside and seize the weapon (R. 66). The agents then went inside the house, where they found petitioner's father, Frank Jones, and his brother, Millard Jones (R. 18). The agents also found untaxed liquor, a large illegal distillery, and numerous vats and drums used in connection with the distillery (R. 57, 72, 78–79). Petitioner arrived home at about 10:00 p. m. (R. 32). He claimed ownership of the distillery (R. 35).

2. On October 8, 1956, petitioner moved to suppress as evidence and have returned to him the boiler, burner, and 15 barrels seized by the agents in his home (R. 4). The district court heard extensive testimony and then denied the motion, holding that the agents had probable cause to conduct a search without a warrant (R. 95–101). The Court of Appeals affirmed *per curiam*, attaching the district court's ruling as an appendix to its opinion.

We do not read the opinion of the district court, on which the Court of Appeals affirmed, as justifying the search merely on the basis of probable cause to believe that there was an illegal still in the house which would serve as evidence of a charge to be later brought. Such a ruling would be contrary to the holding of this Court in *Taylor* v. *United States*, 286 U. S. 1; see also *Agnello* v. *United States*, 269 U. S. 20, 33. the facts of this case bring it within the exception suggested by *Taylor, supra*, that an entry without a warrant is justified in order to make an arrest.

In this case, the agents had probable cause to believe that there were persons then in the house in the process of engaging in illegal operations in alcohol.[1] After arresting the men in the truck, it was observed that the truck tracks led around to the back door of the house and were the only tracks to be seen (R. 72). The agents had seen several persons moving around in the house before they moved in (R. 77–78), and the hose carrying spent mash into the stream was still in place (R. 71). The large quantity of alcohol on the truck (over 400 gallons in 68 cases (R. 43, 57)) suggested that more than two men may have been required to load it. The agents were, therefore, justified in entering the house to arrest participants in the distillery operation. *Ellison* v. *United States*, 206 F. 2d 476, 479 (C. A. D. C.); *Martin* v. *United States*, 183 F. 2d 436, 439 (C. A. 4), certiorari denied, 340 U. S.

[1] There is no dispute about the presence of probable cause to make an arrest, which distinguishes this case from *Miller* v. *United States*, No. 126, certiorari granted, 353 U. S. 957, where probable cause is an issue.

957; *United States* v. *Dean*, 50 F. 2d 905 (D. C. Mass.). As it turned out, the agent did not find petitioner, whose arrest was contemplated, but they did find his father and brother. Although these men were not arrested at the time,[2] this does not detract from the fact that the agents had reasonable cause to believe that someone in the house at the time they made the entry was then in the process of committing a felony. The entry was therefore legal, and the agents could properly seize the distillery and other items of contraband subject to forfeiture. *United States* v. *Rabinowitz*, 339 U. S. 56, 60.[3]

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[2] The record is silent as to whether or not Frank and Millard Jones were arrested. We have ascertained, however, that no arrests were made in the house.

[3] United States Marshals have the power to make arrests without warrant on reasonable grounds to believe that a felony has been or is being committed. 18 U. S. C. 3053. It is believed that 26 U. S. C. 5313 conferring upon the Secretary of the Treasury, or his agents, the rights, privileges, etc., which are conferred by law for the enforcement of any laws in respect of the "* * * use of, or traffic in, intoxicating liquors", confers upon the agents the powers of marshals. This has been held in *United States* v. *Dalson*, 288 Fed. 199, 203 (E. D. Mich.), at a time when former 18 U. S. C. (1946 ed.) 593 specifically referred to such powers of marshals in relation to liquor offenses, and in *United States* v. *Jones*, 204 F. 2d 745, 753 (C. A. 7), certiorari denied, 343 U. S. 854, with regard to narcotics. See also *Trupiano* v. *United States*, 334 U. S. 699, and *Scher* v. *United States*, 305 U. S. 251, where the Court assumed that Treasury agents had such power.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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